

**DEC 22 2005**

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**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

QUIRINO CANEDO OCHAVE,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney  
General,

Respondent.

No. 04-70242

Agency No. A70-945-061

MEMORANDUM<sup>\*</sup>

On Petition for Review of an Order of the  
Board of Immigration Appeals

Argued and Submitted November 16, 2005  
Pasadena, California

Before: BRIGHT<sup>\*\*</sup>, B. FLETCHER, and SILVERMAN, Circuit Judges.

The Ochaves petition for review of the BIA's denial of Mrs. Ochave's  
motion to reopen her case for adjustment of status based on the Department of

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<sup>\*</sup> This disposition is not appropriate for publication and may not be  
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The Honorable Myron H. Bright, Senior United States Circuit Judge  
for the Eighth Circuit, sitting by designation.

Labor's approval of her labor certification and Mr. Ochave's motion to reopen for renewed suspension of deportation, asserting membership in the class defined in the settlement agreement, *Barahoma-Gomez v. Ashcroft*, 243 F. Supp.2d 1029 (N.D. Cal. 2002). We have jurisdiction over this petition for review under § 309(c) of the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002).

The immigration judge (IJ) denied Petitioners' applications for asylum, withholding of deportation, and suspension of deportation in 1996, and the BIA affirmed that decision in 1999. This court denied the Ochaves' petition for review. *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001). On September 5, 2003, the Ochaves filed their motions to reopen when Mrs. Ochave became eligible for adjustment of status under INA § 245(I) based upon the Department of Labor's approval of her application for labor certification.

We review the BIA's denial of their motions to reopen for an abuse of discretion. *INS v. Doherty*, 502 U.S. 314, 323 (1992). A motion to reopen must be filed within ninety days of "the date of entry of a final administrative order of removal, deportation, or exclusion...." 8 C.F.R. § 1003.2(b). The critical date, by which the Ochaves were required to file their motions to reopen, was the BIA's

affirmance of the IJ's denial of relief: May 26, 1999. Their motions to reopen were filed more than four years later. Petitioners also fail to articulate a viable claim that their case qualifies under an exception allowing extension of the ninety-day rule.<sup>1</sup>

The BIA was within its discretion to deny Petitioners' motion to reopen for untimeliness. We affirm that decision.

PETITION DENIED.

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<sup>1</sup> Mr. Ochave does not qualify as a member of the *Barahona-Gomez* class. *Barahona-Gomez v. INS*, 243 F. Supp.2d 1029, 1031 (N.D. Cal. 2002). Moreover, labor certification does not provide the basis for an exception, and Petitioners do not otherwise qualify under an exception to the ninety-day rule. *Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004); *Iturribaria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003).